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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

NICOLE RADICH, Plaintiff and Appellant, v. ERIC WILLIAM FOSTER, Defendant and Respondent.	B288794 (Los Angeles County Super. Ct. No. BC505902)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elaine W. Mandel, Judge. Affirmed.

Law Offices of John J. Jackman and John J. Jackman for Plaintiff and Appellant.

Gates, Gonter, Guy, Proudfoot & Muench, K. Robert Gonter, Jr., Thomas A. Scutti; Knapp, Petersen & Clarke, Stephen C. Pasarow and Maria A. Grover for Defendant and Respondent.

Nicole Radich (Radich) appeals from a judgment after jury trial. She contends the trial court erred in awarding costs to Eric Foster (Foster) under Code of Civil Procedure section 998[1] on the grounds that: (1) the offer, which was made jointly by Foster and his then-codefendant (and mother) and served solely by his mother's attorney, was invalid because the attorney lacked actual or apparent authority to bind Foster to a settlement; (2) the joint offer was invalid because it could not be evaluated against all of the defendants; and (3) when the recovery by her co-plaintiff (and brother) is taken into account, she actually obtained a result more favorable than Foster's $100,000 offer.

We find no error and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Accident

On May 4, 2011, Radich was driving a Nissan Altima in which Krista Smee was a passenger. Foster, aged 20 at the time, was driving a Ford Raptor owned by his parents, Debra Foster (Debra) and William Foster (William), in which Radich's brother, John Radich (John) was a passenger.[2] A collision occurred between the Altima and the Raptor; Radich and John suffered injuries.

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[1] Unless otherwise indicated, all further section references are to the Code of Civil Procedure.

[2] We refer to Debra, William and John by their first names solely to distinguish them from appellant and respondent and intend no disrespect thereby.

II. The Lawsuit

Radich and John filed a complaint against Foster, William and Debra on April 15, 2013.[3] The plaintiffs alleged they suffered personal injuries and property damage as a result of the accident. They further alleged in very general terms that each of the defendants "negligently owned, controlled, repaired, entrusted, maintained and operated [the] automobile," that each defendant "[was] the owner of [the] aforementioned automobile [which] was being used and operated with the knowledge and consent of said owners," and each defendant "was the agent and employee of each of his [or her] codefendants, and in doing the things herein described was acting within the scope of his [or her] authority as such agent and employee."

Foster, William and Debra, represented by attorney Michael Booser (Booser), answered the complaint and asserted several affirmative defenses, including comparative negligence and the limitation on recovery against William and Debra, as the owners of the automobile Foster drove, imposed by Vehicle Code section 17150 et seq.[4] Radich and John subsequently dismissed their complaint against William with prejudice.

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[3] The complaint also identified Krista Smee as a plaintiff, but Smee is not a party to this appeal.

[4] Section 17151, subdivision (a), of the Vehicle Code provides that "[t]he liability of an owner . . . is limited to the amount of fifteen thousand dollars ($15,000) for the death of or injury to one person in any one accident and, subject to the limit as to one person, is limited to the amount of thirty thousand dollars ($30,000) for the death of or injury to more than one person in any one accident and is limited to the amount of five thousand dollars ($5,000) for damage to property of others in any one accident."

A. *The Section 998 Offers*

In June 2016, Foster substituted the law firm of Gates, O'Doherty, Gonter & Guy LLP and attorney K. Robert Gonter (Gonter) for attorney Booser. Just over a year later, in June 2017, Debra associated in the firm of Knapp, Petersen & Clark and attorney Stephen Pasarow (Pasarow) as cocounsel with Booser.

On September 25, 2017, Pasarow served two separate offers to compromise pursuant to section 998 (section 998 offers). The section 988 offer to Radich read: "Defendants DEBRA FOSTER jointly with Defendant Eric Foster ('offering defendant(s)') offer to settle this matter with Plaintiff NICOLE RADICH . . . for the sum of [$100,000] to be paid by draft issued to Nicole Radich . . . in exchange for a dismissal with prejudice of the complaint against offering defendant(s), each party to bear their own costs and attorney's fees. [¶] This offer to settle is open for acceptance for 30 days after service of this offer to settle, or until commencement of trial, whichever occurs first, and if it is not accepted within that time, then it will be deemed revoked and the offer to settle will be withdrawn." The section 998 offer to John was identical in all respects, save the amount of the offer, which was $20,000. Both section 998 offers identified, and were signed by, Pasarow and his firm as "Attorneys for Defendant DEBRA FOSTER." Gonter, as counsel for Foster, was not listed in the caption of either offer, nor did he sign them. The section 998 offers expired by their own terms on October 25, 2017.

John, by and through the attorney who represented both plaintiffs, Mindy Bish (Bish), accepted Foster and Debra's joint 998 offer on October 5, 2017. Radich did not accept the joint offer made to her.

At the October 16, 2017 final pretrial status conference, Radich and John dismissed their complaint against Debra, with prejudice, in return for a waiver of costs. That same day, Foster associated Pasarow and his firm as cocounsel with Gonter.[5]

Radich's complaint against the only remaining defendant, Foster, proceeded to a jury trial on October 24, 2017. Following deliberations, the jury returned a verdict for Radich and awarded her noneconomic damages in the amount of $75,000. Judgment was entered in that amount plus costs "pursuant to any posttrial motions."

B. *The Motions To Tax Costs*

Radich, as the prevailing party, filed a memorandum of costs, seeking to recover $21,304. Foster also filed a memorandum of costs in the amount of $56,879.86 for various costs including expert witness fees.

Both parties filed motions to tax the other party's costs.

1. *Radich's Motion to Tax Foster's Costs*

Radich moved to tax Foster's costs on the grounds that, among other reasons, (1) Foster's section 998 offer was invalid because Pasarow did not represent Foster at the time the offer was made and had no actual authority to bind him to a settlement offer, (2) the joint section 998 offer was fatally uncertain and improper because Debra was sued for negligent entrustment, for which there was no joint and several liability, and (3) some of Foster's costs were unreasonable or were not

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[5] Foster's section 998 offer to Nicole had not expired as of the date he associated Pasarow in as cocounsel.

properly apportioned between pre- and post-section 998 offer costs.

In opposition, Foster argued his section 998 offer was neither invalid nor uncertain because Debra was vicariously liable for Foster's conduct based on the concept of permissive use, and therefore a joint offer to compromise was appropriate. In response to Radich's contention that Pasarow lacked actual or apparent authority to make the section 998 offer on behalf of Foster, who Pasarow did not represent at the time the offer was served, Foster argued Radich's attorneys accepted a nearly identical offer made to John, and did not question the validity of the section 998 offer at that time or upon receipt of the settlement payment.

2. *Foster's Motion To Tax Nicole's Costs*

Foster, in turn, moved to tax $12,170.30 of Radich's costs on the ground the judgment of $75,000 was substantially below Foster's section 998 offer of $100,000, so Radich was not entitled to recover itemized costs incurred after the September 25, 2017 service of the offer.

Radich did not oppose the motion.

3. *Ruling on Motions To Tax*

The trial court, without specifically addressing Radich's argument that Pasarow did not represent Foster and lacked authority to tender a joint section 998 offer on behalf of Foster and Debra at the time of its making, found the offer to be valid: "In this case, [Radich's] claims against both the owner and driver defendants arose solely from the conduct of the driver, and the only allegation against the parents was for vicarious liability for

the son's conduct. The complaint alleges the defendants were agents and/or employees of one another. Under [Radich's] theory of the case, defendants would be jointly and severally liable for the driver's conduct. Thus, the [c]ourt has no basis to conclude the [section] 998 offer is invalid." Noting Radich did not argue that any of Foster's claimed costs were unreasonable or not actually incurred, the court denied Radich's motion to tax Foster's costs in its entirety and awarded Foster his postoffer costs in the amount of $56,879.86.

Having found the section 998 offer to be valid, the trial court granted Foster's motion to tax costs sought by Radich that she incurred after the September 25, 2017 section 998 offer, and reduced Radich's recoverable costs by $12,170.30, to $9,133.70.

Following entry of an amended judgment, Radich appealed the order on both motions. We find the trial court made no error in its ruling and affirm the judgment in full.

DISCUSSION

Generally, a prevailing party in a civil case "is entitled as a matter of right to recover costs." (§ 1032, subd. (b).) Recoverable costs do not typically include the fees of expert witnesses not ordered by the court. (§§ 1032, 1033.5, subd. (b)(1).) But expert witness fees are recoverable in some circumstances, as when a plaintiff fails to achieve a judgment greater than the amount of a defendant's valid pretrial section 998 settlement offer. (See *Martinez v. Brownco Construction Co.* (2013) 56 Cal.4th 1014, 1019 & 1022, fn. 4; accord, *Kahn v. The Dewey Group* (2015) 240 Cal.App.4th 227, 237.)

Under section 998, until 10 days before trial "any party may serve an offer in writing upon any other party to the action to allow judgment . . . to be entered in accordance with the terms and conditions stated at that time." (§ 998, subd. (b).) If the offer is not accepted within 30 days or before trial, whichever occurs first, it is deemed withdrawn. (*Id*., subd. (b)(2).) The failure to accept an offer has consequences for a plaintiff who does not obtain a more favorable result at trial. In that event, the plaintiff cannot recover her postoffer costs, must pay the defendant's costs from the time of the offer, and may be held liable (as was the case here) for a reasonable sum to cover the defendant's expert witness fees. (§ 998, subd. (c)(1).)

Section 998 is intended to encourage the settlement of lawsuits prior to trial by penalizing a party who fails to accept a reasonable settlement offer. (*T. M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 280.) "To effectuate this policy, section 998 provides 'a strong financial disincentive to a party—whether it be a plaintiff or a defendant—who fails to achieve a better result than that party could have achieved by accepting his or her opponent's settlement offer.' [Citation.] At the same time, the potential for statutory recovery of expert witness fees and other costs provides parties 'a financial incentive to make reasonable settlement offers.' [Citation.] Section 998 aims to avoid the time delays and economic waste associated with trials and to reduce the number of meritless lawsuits. [Citations.]" (*Martinez v. Brownco Construction Co.*, *supra*, 56 Cal.4th at p. 1019.)

As relevant here, section 998 provides: "(a) The costs allowed under Sections 1031 and 1032 shall be withheld or augmented as provided in this section. [¶] . . . [¶] (c)(1) If an offer made by a defendant is not accepted and the plaintiff fails to

obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, . . . the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover postoffer costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant."

I. The Section 998 Offer Was Valid

Radich proffers two arguments why the section 998 offer was invalid and could not, as a matter of law, support the trial court's order striking her postoffer costs and awarding Foster his postoffer costs. Radich first asserts that Debra's attorney, Pasarow, did not have either implied or apparent authority to make the offer on Foster's behalf. She then contends the section 998 offer was invalid because it was made jointly by Foster and Debra but could not be evaluated against "all defendants." We address each contention in turn.

A. *Pasarow Had Authority To Bind Foster to the Section 998 Offers*

The parties do not dispute the following facts: (1) Pasarow did not represent Foster on September 25, 2017, the date Foster and Debra, through Pasarow, made the two joint section 998 offers to Radich and John; (2) Foster associated Pasarow in as counsel of record on October 16, 2017, prior to the statutory 30-day expiration of the section 998 offers; and (3) Bish accepted the offer made to John on October 5, 2017. Radich contends the

section 998 offer made to her was invalid, and did not trigger the cost-shifting mechanism of section 998, because Pasarow lacked authority to act on Foster's behalf.

We independently review whether a section 998 offer was valid.[6] (*Prince v. Invensure Ins. Brokers, Inc.* (2018) 23 Cal.App.5th 614, 622.) On appeal, the judgment or order challenged is presumed correct and the burden is on the appellant to affirmatively demonstrate error. (*Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1408.)

1. *Foster Ratified Pasarow's Authority*

In order for Foster's section 998 offer to be valid, Pasarow must have had actual or ostensible authority to make the offer. (Civ. Code, § 2315 ["An agent has such authority as the principal, actually or ostensibly, confers upon him"].) Actual authority stems from conduct of the principal which causes the agent reasonably to believe that the principal has consented to the agent's act. (*Id.*, § 2316.) Ostensible authority arises from conduct of the principal which leads the third party reasonably to believe that the agent is authorized to bind the principal.

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[6] Foster, citing the decision by Division Eight of this district in *Whatley-Miller v. Cooper* (2013) 212 Cal.App.4th 1103, asks us to apply an abuse of discretion standard in this case because, in his view, the existence of certain factual issues precludes our independent review. We decline Foster's invitation. To the extent facts are disputed by the parties, such as the purported conflict of interest between Foster and Debra that prevented their joint representation by a single attorney, we find those facts are not relevant to the determination of the issues presented by this appeal. As discussed, our decision is based solely on facts that are not disputed by the parties.

(*Id.*, § 2317; *Mannion v. Campbell Soup Co.* (1966) 243 Cal.App.2d 317, 320.)

Whether actual or ostensible, creation of an agency relationship requires conduct by both the agent and the principal: " '[A]gency cannot be created by the conduct of the agent alone; rather, *conduct by the principal* is essential to create the agency.' " (*Goldman v. Sunbridge Healthcare, LLC* (2013) 220 Cal.App.4th 1160, 1173.) " ' "The principal must in some manner indicate that the agent is to act for him [or her], and the agent must act or agree to act on his [or her] behalf and subject to his [or her] control.". . .' [Citations.] Thus, the 'formation of an agency relationship is a bilateral matter. Words or conduct by *both principal and agent* are necessary to create the relationship . . . . ' " [Citations.]' [Citation.]" (*Ibid.*; accord, *Young v. Horizon West, Inc.* (2013) 220 Cal.App.4th 1122, 1132 ["ostensible authority cannot be created merely by a purported agent's representations"].)

In asserting Pasarow lacked authority to make a section 998 offer on behalf of Foster, Radich looks solely to the undisputed fact that Pasarow was not *counsel of record* for Foster at the time Pasarow served the offer. But that circumstance does not preclude a finding that Pasarow acted as Foster's agent in making the offer. Actual agency may be created by ratification. (Civ. Code, § 2307; *van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 571.) Ratification is " 'established by implication from the conduct and acts of the party in whose behalf the unauthorized agency was assumed, inconsistent with any reasonable intention on his part, other than that he intended approving and adopting it.' " (*UFCW & Employers Benefit Trust v. Sutter Health* (2015) 241 Cal.App.4th 909, 932-933.)

Foster correctly notes that "the record is devoid of any complaint by [him] as to the validity of the statutory offer served upon Radich." We find the absence of any objection by Foster at any point in either the trial court proceedings or on appeal compelling. To the extent Foster never granted Pasarow authority to bind him to a settlement by making the section 998 offers, he had multiple opportunities to object. Foster's attorney, Gonter, was served with both offers at the time they were made, but the record does not reflect any contemporaneous objection by Gonter. The record is also devoid of any objection at the time Foster, through Gonter, was served with John's acceptance of the separate section 998 offer made to him. Finally, when presented with Radich's contention in both the trial court on appeal that the section 998 offers were invalid for lack of authority, Foster—represented on those occasions by both Gonter and Pasarow—consistently argued the offers were valid despite the fact that Pasarow was not his counsel of record at the time of service.

We also find it significant that Bish, who represented both Radich and John throughout the trial proceedings, accepted without question a virtually identical offer made by Pasarow to John. " 'If the offeree is uncertain about some aspect of [a section 998] offer, . . . he [or she] is free to explore those matters with the offeror, or even to make counterproposals during this period in which the statutory offer remains outstanding.' [Citation.]" (*Prince v. Invensure Ins. Brokers, Inc.*, *supra*, 23 Cal.App.5th at pp. 622-623.) There is no evidence that Bish ever raised a question about Pasarow's authority to make an offer to John on Foster's behalf. Accordingly, we infer that Radich is attempting to avoid the cost-shifting purpose behind section 998 based on a claimed procedural defect that her attorney was willing to waive

on John's behalf. "If the statutory purpose behind section 998 is to be served in this case, we cannot permit [appellant] to avoid the consequences of [a prior] decision by claiming now that the offer ought to be construed as one which [she] could not have accepted anyway. Such a construction would be strained, and we decline to do so." (*Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal.App.4th 102, 114.)

2. *Section 664.6 Has No Bearing on This Case*

Radich spends a substantial part of her briefs urging us to consider case law interpreting section 664.6 as instructive on the issue of whether Pasarow could bind Foster to a settlement offer. We decline her invitation. While the general purpose of both statutes is to promote settlement,[7] they are substantially different in both operation and language.

Section 664.6 provides, in pertinent part, "[i]f parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. . . ." Thus, section 664.6, on its face, applies only to an agreement by both parties to settle an action. Not only does it contemplate

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[7] See, e.g., *Bowers v. Raymond J. Lucia Companies, Inc.* (2012) 206 Cal.App.4th 724, 732 ["[§] 664.6 was enacted to provide a summary procedure for specifically enforcing a settlement contract without the need for a new lawsuit"]; see also *T. M. Cobb Co. v. Superior Court*, *supra*, 36 Cal.3d at p. 280 [§ 998 is intended "to encourage the settlement of lawsuits prior to trial" by penalizing a party who fails to accept a reasonable settlement offer].)

mutual agreement, it requires a writing "signed by the parties" if made outside of court. (*Ibid.*; accord, *Sully-Miller Contracting Co. v. Gledson/Cashman Construction, Inc.* (2002) 103 Cal.App.4th 30, 37 ["Because of its summary nature, strict compliance with the requirement[ ] of [§] 664.6 [that both parties sign the agreement] is prerequisite to invoking the power of the court to impose a settlement agreement"].)

Section 998, in turn, applies only to an *offer* to settle and does not require that the offer be signed by anyone at all: "any party may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time." (§ 998, subd. (b).) Acceptance of an offer made under section 998, however, "shall be in writing and shall be signed by counsel for the accepting party or, if not represented by counsel, by the accepting party." (*Ibid.*)

We assume the Legislature acted with intent when it imposed a requirement that an acceptance of an offer made under section 998, but not the offer itself, be signed by the party's attorney or, if the party is unrepresented, by the party itself. " 'The primary duty of a court when interpreting a statute is to give effect to the intent of the Legislature, so as to effectuate the purpose of the law. [Citation.] To determine intent, courts turn first to the words themselves, giving them their ordinary and generally accepted meaning. [Citation.] If the language permits more than one reasonable interpretation, the court then looks to extrinsic aids, such as the object to be achieved and the evil to be remedied by the statute, the legislative history, public policy, and the statutory scheme of which the statute is a part. . . .' [Citation.]" (*Nguyen v. Western Digital Corp.* (2014) 229

Cal.App.4th 1522, 1540; accord, *Troppman v. Valverde* (2007) 40 Cal.4th 1121, 1135.)

In addition, " '[i]t is our task to construe, not to amend, the statute. "In the construction of a statute . . . the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or omit what has been inserted . . . ." [Citation.] We may not, under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used.' [Citation.]" (*Service Employees Internat. Union, Local 1021, AFL-CIO v. County of Sonoma* (2014) 227 Cal.App.4th 1168, 1176; accord, *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349.)

Accordingly, we will not subscribe to Foster's argument that the Legislature intended an offer made under section 998 be signed by the offering party itself. Neither the plain language of the statute nor the statute's legislative history supports such a construction, and we will not rewrite the law.

B. *There is No Merit to Radich's Claim that the Section 998 Offer Cannot Be Evaluated Against All Defendants*

Radich next argues that the joint section 998 offer by Foster and his mother, Debra, is invalid because it cannot be evaluated against "all" defendants. Radich's contention on appeal is that, since she voluntarily dismissed her claims against Debra, with prejudice, before the case went to trial against Foster, the value of the joint section 998 offer cannot be compared to the recovery obtained against all of the defendants who made the offer. Radich's position is, however, based upon her

erroneous assumption that Foster and Debra "were not united in interest."

Radich's argument that the offer cannot be evaluated as to Foster was raised by the plaintiff in *Brown v. Nolan* (1979) 98 Cal.App.3d 445 and soundly rejected: "The parties to this appeal agree that in this action a single plaintiff sued two defendants on a theory of joint and several liability. 'Contributory wrongdoers, whether joint tortfeasors or concurrent or successive tortfeasors, are ordinarily jointly and severally liable for the entire damage. [Citations.] [¶] Hence, when they are joined in an action it is improper to apportion compensatory damages among them; judgment for the full amount should be rendered against each.' [Citation.] When the facts of this case are viewed within the context of these general principles it becomes clear that the offer in issue was one contemplated by section 998.

"Plaintiff's argument that if section 998 is strictly construed it cannot be read as providing for joint offers because it speaks in the singular ('any party may serve an offer . . . . If an offer made by a defendant . . .') is not persuasive. *Where, as here, defendants are sued upon a theory of joint and several liability, each is potentially liable for the full amount of any judgment. Therefore, the offer of compromise in question is properly read as an offer by each defendant to plaintiff that judgment in the amount of $12,500 may be taken against each one of them, jointly and severally.* Thus, the statute's speaking in the singular makes perfect sense when it is applied to defendants sued on such a theory. The trial court erred in holding that section 998 was inapplicable." (*Brown v. Nolan*, *supra*, 98 Cal.App.3d at p. 451, fns. omitted, italics added and omitted.)

The rationale of the *Brown* court holds even greater sway in this case, where the joint offerors, Foster—the allegedly negligent driver—and Debra—the owner of the vehicle Foster was driving—could *only* be joint and severally liable on Radich's claims. By statute, the owner of a motor vehicle is vicariously liable for death or injury to person or property resulting from the wrongful (negligent or intentional) operation of a vehicle by any person using it with the owner's express or implied permission. (Veh. Code, § 17150.) For purposes of permissive use liability, owner and driver are treated as a single tortfeasor: "Whatever noneconomic damages are properly charged to the operator are likewise the burden of the owner." (*Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1854.) Therefore, the joint section 998 offer should be read as an offer by each defendant, Foster and Debra, to accept judgment against either defendant, jointly and severally. It was proper in all respects.

Having determined that the joint section 998 offer made to Radich was valid, we turn to Radich's contention that Foster should not recover costs under section 998 because she "beat" the offer.

II. Radich Failed To Obtain a Judgment More Favorable Than Foster's Section 998 Offer, so the Trial Court Properly Granted Foster's Motion and Taxed Radich's Costs

Radich concedes Foster and Debra served Radich and John with separate section 998 offers. Nonetheless, in support of her argument the trial court's judgment was erroneous, Radich asserts she is entitled to credit for John's separate judgment of

$20,000 in addition to her own judgment of $84,133.70.[8] We join Foster in his rejection of this argument.

In support of her position, Radich cites to the Fifth District's decision in *McDaniel v. Asuncion* (2013) 214 Cal.App.4th 1201 (*McDaniel*), in which Asuncion, one of multiple defendants in a wrongful death action arising from a vehicle accident, made a section 998 offer of $100,000 jointly to the plaintiffs, the wife and daughter of the deceased. (*Id.* at p. 1205.) Following trial, the jury awarded the plaintiffs $3.3 million on their claim against the other (non-offering) defendant, but returned a defense verdict in favor of Asuncion. (*Ibid.*) The trial court awarded Asuncion over $41,000 in expert witness fees pursuant to subdivision (c)(1) of section 998. (*Ibid.*)

The plaintiffs appealed, contending a single section 998 offer addressed to multiple plaintiffs was invalid because, with unallocated settlement offers to multiple plaintiffs, "it may be impossible to determine whether any one plaintiff received a less than favorable result at trial than that plaintiff would have received under the offer." (*McDaniel*, *supra*, 214 Cal.App.4th at p. 1206.) The Court of Appeal affirmed, finding that "a defendant may still extend a single joint offer if the separate plaintiffs have a ' "unity of interest such that there is a single, indivisible injury." ' " (*Ibid.*) The plaintiffs were united in interest since, under California law, "either the heirs or the personal representative on behalf of the heirs may bring a single joint indivisible action for wrongful death . . . [and] [a]ny recovery for

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[8] Radich's judgment consisted of noneconomic damages of $75,000 and pre-section 998 offer costs of $9,133.70, for a total of $84,133.70.

wrongful death is in the form of a lump sum, i.e., a single verdict is rendered for all recoverable damages." (*Id*. at pp. 1206-1207.) Thus, there was "only one verdict to compare to the one joint offer." (*Id*. at p. 1208.)

This case is distinguishable from *McDaniel* in one material respect: while an unapportioned section 998 offer was made to multiple plaintiffs in *McDaniel*, the section 998 offer at issue in this case was made to only one plaintiff: Radich. Thus, we are not presented with the conundrum addressed by the *McDaniel* court of whether an unapportioned section 998 offer made to multiple plaintiffs was invalid since it could not be measured against a single verdict.

The only other authority cited by Radich, *Farag v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 372 (*Farag*), is similarly inapplicable. In that case, a single section 998 offer made by one defendant jointly to a husband and wife was sufficient to trigger section 998's cost-shifting mechanism. The court determined that, regardless of whether the injuries claimed by a husband and wife were " ' "indivisible" or "separate," there [was] no reason to require a settlement offer to be made separately to each spouse to be valid under section 998. "[U]nlike an offer expressly conditioned on acceptance by all plaintiffs, the offer in this case did not have to be accepted by both [spouses] to be effective . . . [since] either [spouse] could have accepted [the defendant's] offer on behalf of the community." [Citation.]' [Citation.]" (*Farag*, *supra*, at p. 381.)

Radich offers no authority to support her assertion that "[a]ll totaled [she] obtained $104,133.70 in damages, settlements and costs . . . ." She is not entitled to claim the benefit of the separate settlement offer made to, and accepted by, John for his

personal injuries. Radich and John are siblings, so John's damages are not community property, as were the damages in *Farag*. Nor does Radich cite to any law which would support a finding that the siblings' personal injury action was indivisible like the wrongful death claim in *McDaniel*.

At most, Radich is entitled to credit for her preoffer costs when determining whether she achieved a judgment more favorable than Foster's section 998 offer. (*Heritage Engineering Construction, Inc. v. City of Industry* (1998) 65 Cal.App.4th 1435, 1442 [contractor's preoffer costs were required to be added to judgment in its favor in its action against city to determine whether judgment was more favorable than city's settlement offer].) Radich's total costs were $21,304. However, when added to the $75,000 in noneconcomic damages awarded to Radich by the jury, the total amount of $96,304 is still not greater than Foster's section 998 offer of $100,000.

DISPOSITION

The judgment is affirmed. Foster is awarded his costs on appeal.

NOT TO BE PUBLISHED

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

WEINGART, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.